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No. 86-1134

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

VGS CORPORATION
d/b/a SOUTHLAND OIL COMPANY
and GLOBE ASPHALT CO., INC.,
Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and
JOHN S. HERRINGTON, SECRETARY OF ENERGY,
Respondents.

On Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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BRIEF OF AMICUS CURIAE CONSUMERS POWER COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the doctrine of federal sovereign immunity bars claims for interest on funds held by the United States under circumstances in which the funds (a) were collected from regulatory violators for the express purpose of compensating members of the claimant's class who were injured by those violations and (b) are held in an interest-bearing escrow account as to which the United States makes no claim of title.

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BRIEF OF AMICUS CURIAE CONSUMERS POWER COMPANY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

Consumers Power Company ("Consumers Power") respectfully submits this brief in support of Petitioners. At stake before this Court is the right of Consumers Power—and approximately one million gas customers—to receive $8.2 million of postjudgment interest, and a

greater amount of prejudgment interest, accruing on their own money while those funds were held by the government in escrow.

Consumers Power Company is a public gas and electric utility, regulated by the Michigan Public Service Commission, that supplies electricity and gas to a service area with more than 5.3 million residents throughout Michigan. During the period September 1973 through December 1979, Consumers Power owned and operated a synthetic natural gas ("SNG") plant at Marysville, Michigan (the "Marysville plant") at which it converted petroleum liquids, including Canadian plant condensate, into various petroleum products. The SNG produced at the Marysville plant was sold to the gas customers of Consumers Power. Under the applicable rate tariffs, Consumers Power is permitted to pass through to its customers increases in the costs of SNG feedstock and is required to pass through to its customers decreases in such costs.

Consumers Power and its customers have an interest in this Petition because, like Petitioners, Consumers Power established similar rights through a series of administrative and judicial decisions relating to the operation of the Marysville plant. Consumers Powers was deemed to be a "refiner" and thus eligible to participate in the federal government's Entitlements Program,[1] *Consumers Power Company*, Interpretation 1979-26, 45 Fed.

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[1] From 1974 until 1981, the United States, through the Department of Energy ("DOE") and its predecessor agency, the Federal Energy Administration ("FEA"), administered a Program designed to ensure that all refiners paid the same cost per barrel for crude oil even through crude oil prices varied under a multi-tiered system of price controls. Under this so-called Entitlements Program, refiners with greater than average access to low price domestic oil bought "entitlements" from refiners with less than average access to low cost crude. *See generally, Pasco, Inc. v. FEA*, 525 F.2d 1391 (TECA 1975).

Reg. 5664 (Jan. 24, 1980), and was found to be *required* to so participate, *Consumers Power Company v. DOE*, Civil Action No. 71-71112 (E.D. Mich., Sept. 8, 1982), at all times after November 1, 1974. *Consumers Power Company v. DOE*, 742 F.2d 1468 (TECA 1984). Like Petitioners, Consumers Power was placed in the exception relief class of refiners[2] due benefits from the entitlements program. Also like Petitioners, these entitlements benefits were ultimately paid[3] from crude oil overcharge funds collected from regulatory violators and held in an interest-bearing account by DOE.[4]

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[2] "Exception" relief was granted to certain firms in the Entitlements Program to "prevent special hardship, inequity or unfair distribution of burdens" which full participation may have caused. *See* § 504(a) of the Department of Energy Organization Act, 42 U.S.C. § 7194.

[3] While the Entitlements Program was operating, exception relief would be easily implemented via monthly entitlements notices. Recipients of exception relief would either have the number of entitlements they could sell increased or the number of entitlements they were required to purchase lowered. This mechanism for implementing exception relief no longer exists. On January 28, 1981, President Reagan ended the price and allocation regulations on all crude oil and petroleum products. Exec. Order No. 12,287. The monthly entitlements notice for January 1981 was then postponed by a series of federal court injunctions. A final "clean-up" entitlements notice implementing exception relief was proposed, 46 Fed. Reg. 36092 (July 13, 1981), delayed, and finally abandoned. 48 Fed. Reg. 50824 (Nov. 3, 1983). *See Texaco v. DOE*, 795 F.2d 1021 (TECA), *cert. dismissed*, 107 S. Ct. 10 (1986).

[4] DOE had collected over $200 million in principal from violators of crude oil pricing regulations, 50 Fed. Reg. 1919, 1921 (1985), and deposited them in an interest-bearing escrow account. DOE concluded that the overcharge escrow was an appropriate surrogate for the payment of relief under the Entitlements Program because refiners such as Petitioners and Consumers Power had suffered injury from the overcharge violations through the operations of the Program.

It has taken over nine years for Consumers Power to obtain disbursement of these funds from DOE's escrow account to compensate Consumers Power for the principal due it. This arduous process included several administrative decisions, several federal district court rulings and two appeals to the Temporary Emergency Court of Appeals.[5] DOE refused, however, to permit these funds to be used to compensate Consumers Power for DOE's wrongful delay in implementing the relief, asserting that an award of interest was barred by sovereign immunity.

DOE's refusal to make Consumers Power whole forced Consumers Power back to federal court where Consumers Power obtained an order entitling it to interest on the principal from September 8, 1982. *Consumers Power Company v. DOE*, Civ. Action No. 71-71112 (E.D. Mich., Aug. 14, 1985). DOE appealed that decision asserting the same arguments that were accepted by TECA in the case now before this Court. *Consumers Power Company v. DOE*, No. 6-35 (TECA 1985). As the Order attached as an appendix to this brief recites, the Court of Appeals has stayed that action pending the resolution by this Court of this case.

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[5] Indeed, DOE agreed to pay the principal only after TECA instructed it in a similar case that:

> We are of the opinion that the public interest is fundamentally against the delay imposed by DOE in this case, and as [sic] against the principles of good government and proper treatment of its citizens, including its corporate citizens, and that the public interest really cries out for the Congressional mandate of this case to be complied with, and be complied with within the reasonable time.

Navajo Refining Co. v. DOE, No. 10-62 (TECA Dec. 10, 1985) (Transcript of Proceedings at 45). In *Navajo*, TECA orally denied DOE's motion to stay disbursement of similar funds in an entitlements exception relief case closely similar to that before the Court.

STATEMENT OF THE CASE

The Court of Appeals was squarely presented with the issue of whether the accumulated interest on the escrow account was to be used to compensate private parties, such as Petitioners, or whether these earnings on private funds would be retained by the government. In assessing this question the Court of Appeals also had before it the long history of regulatory delay in effectuating relief due Petitioners. Indeed, the district court had characterized DOE as "a dishonest litigant" whose record of "playing fast and loose with federal courts across the United States" caused "delay-delay-delay." Pet. App. at 20a. The Court of Appeals itself surveyed the record of DOE procrastination and stated that "[t]he actions by DOE over the last five years in this and other matters have been simply beyond belief." Pet. App. at 7a.

Although acknowledging that "the equities all favor" the private parties, Pet. App. at 7a, the Court of Appeals, in effect, rewarded the government for its delaying tactics by barring the claim. The court did not deem relevant the fact that the award of interest would be made from private monies held in escrow by the government in an interest-bearing account for the benefit of private parties. Pet. App. at 9a. Nor did the court deem pertinent the fact that the government had never claimed a right to the money. *Id.* Rather, the court simply applied the doctrine of sovereign immunity "in a mechanical fashion," *id.*, and barred the claim, stating:

> [t]he Treasury has the money and the claim is against the United States to recover that money. This is sufficient to bring sovereign immunity into play.

Pet. App. at 9a. Petitioners have properly asked this Court to review the extension of the sovereign immunity doctrine to interest earned on private monies held in an interest-bearing escrow account for the benefit of private parties.

REASONS FOR GRANTING THE WRIT

Professional comment and criticism has been almost universal in calling for the abolition (or at least the restriction) of the doctrine of federal sovereign immunity. As stated by one commentator:

> It is the inherited wisdom of the American bar that responsible professional comment and criticism are the principal restraints upon judicial arbitrariness at the highest level and major influences in the continuing development of court-made law. If there is one legal development (or, perhaps more accurately, nondevelopment) found in the pages of the United States reports during the present century which would cause the most credulous observer to doubt the truth of this axiom, it is the continued good health of the doctrine of sovereign immunity.

Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions From the Public-Lands Cases*, 68 Mich. L. Rev. 867, 867 (1970). *See also* Davis, *Sovereign Immunity Must Go*, 22 Ad. L. Rev. 383 (1970).

This Court has long recognized that sovereign immunity "has not been favored by the test of time." *National City Bank v. Republic of China*, 348 U.S. 356, 359-60 (1955). The lower courts have also criticized the doctrine. *See, e.g., Keller v. Metropolitan County Board of Education*, 372 F. Supp. 528, 535 (M.D. Tenn. 1973) (sovereign immunity "should be abolished because it lacks a rational basis"). Accordingly, the doctrine "ought not to be extended" beyond the parameters of prior case law. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 723 (1949) (Frankfurter & Burton, JJ., dissenting). As stated by one commentator, expansion of federal sovereign immunity is "incredible in the conventionally hyperbolic sense." Scalia, *supra* at 869, n.6.

The Court of Appeals, in the face of this reasoned criticism, has effectively extended the doctrine of sover-

eign immunity to areas in which it has never before been applied and has ignored controlling precedent of this Court in so doing. For that reason, and because the ruling below involves an important issue, promising mischief in numerous other contexts, the Court should grant review.

I. Review Is Warranted Because The Decision Below Is Contrary To Controlling Precedent Of This Court.

This Court has frequently condemned "mechanical" applications of sovereign immunity of the sort engaged in below. *See, e.g., Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512, 521 (1984) (criticism of applying sovereign immunity according to "a ritualistic formula"); *Library of Congress v. Shaw*, 106 S. Ct. 2957, 2966 (1986) (Brennan, Marshall & Stevens, J.J., dissenting) (criticism of construing waivers of sovereign immunity "in a wooden and archaic fashion"). Rather, this Court has consistently instructed that evaluating a claim of sovereign immunity requires that a court assay the true effect of the judgment on the public fisc.

As stated by this Court, if "[t]he 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public domain, or interfere with the public administration," then "the suit is one against the sovereign." *Land v. Dollar*, 330 U.S. 731, 738 (1947) (citations omitted). *See also Dugan v. Rank*, 372 U.S. 609, 620 (1963) (suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration"). Stated differently, the test when money is at issue is whether "the suit is essentially one designed to reach money which the government *owns*." *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375 (1945) (emphasis added).

The "essential nature and effect" of this lawsuit is not to reach money (or anything else) which the government "owns." Indeed, DOE has disclaimed ownership of the funds in question. Rather, this case involves a claim for interest on money held by the government for persons of Petitioners' class. Ignoring this distinction, the Court of Appeals failed to apply the test long-established by this Court.

Indeed, this Court has applied the distinction between public funds and private funds held by the government in numerous cases indistinguishable from the case in hand. For example, in *Henkels v. Sutherland*, 271 U.S. 298 (1926), Henkels' stock was unlawfully seized, then sold with the proceeds being placed in interest-bearing securities. The Court held that Henkels was entitled to that interest, finding that case not "in the sense of the rule" prohibiting an award of interest against the United States. 271 U.S. at 301.

Similarly, in *Miller v. Robertson*, 266 U.S. 243 (1924), Robertson sued the United States to recover a debt owed by enemy aliens whose property was seized. This Court awarded interest in spite of claims of sovereign immunity reasoning that "[w]hile the suit . . . is one against the United States, the claim was not against it." 266 U.S. at 257.[6]

Nor do the two cases relied upon by the Court of Appeals abrogate this rule. In *United States v. Louisiana*, 446 U.S. 253 (1980), an agreement between Louisiana

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[6] The result below is also inconsistent with this Court's decision in *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In *Webb's Fabulous Pharmacies*, the Court held that a state's claim to interest on private money tendered to the clerk of a state court and placed in an interest-bearing account for the ultimate benefit of private parties would run afoul of the Fifth Amendment. If government seizure of interest on private monies raises a taking issue, then sovereign immunity cannot logically be asserted in defense of a private party's claim for that interest.

and the United States placed revenues from certain disputed mineral leases in escrow pending resolution of ownership rights to those funds. Importantly, the parties neglected to put into the agreement any duty to invest the proceeds. Indeed, the record showed that Louisiana specifically decided not to insist on a duty to invest clause during the negotiations and acquiesced for many years by receiving regular reports showing that no interest was accumulating. 446 U.S. at 265. The Court's decision against an award of interest to Louisiana merely reflects a natural reluctance to read into freely negotiated contracts such a significant term.

Similarly, *United States v. N.Y. Rayon Importing Co. (#2)*, 329 U.S. 654 (1947), involved a different type of account from that at issue in this case. In *Rayon*, disputed custom fees were collected and deposited in an apparently non-interest bearing account pending determination of whether these monies were rightfully collected. Subsequently, when the true owners sued to collect interest on the funds wrongfully held, this Court barred their claim under sovereign immunity. *Rayon* is silent as to whether the funds were earning interest or not. However, the Court's reference to "the *appropriation* statutes which cover the refunds here in issue," 329 U.S. at 659 (emphasis added), strongly suggests that the monies were *not* earning interest and that refunding with interest would drain appropriated funds. Thus, the *Rayon* holding is at the very heart of the doctrine of sovereign immunity and adopts the very rule which the Court of Appeals failed to apply.

II. This Court Should Grant Plenary Review Because The Issue Is Important And Likely To Recur.

Not only was the decision below inconsistent with prior decisions of this Court, the ruling promises to work substantial mischief in other contexts. The government acts as trustee of large escrow accounts under numerous other federal statutes, all of which are silent as to the issue of

interest. The question decided below is thus likely to arise again in other contexts and should be put to rest now.

For example, under the terms of Pub. L. No. 98-473, 98 Stat. 2175 (1984), after a defendant is convicted of a crime resulting in physical harm, a court may seize the payments received by the criminal from the sale of stories depicting the crime and retain these funds in escrow for five years in the Crime Victims Fund in the treasury. 18 U.S.C. § 3671(a). Victims of the crime or the United States may then levy the funds to satisfy money judgments or fines. 18 U.S.C. § 3671(e). Yet, no provision is made for the recovery of interest.

Similarly, under the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842 (1985), states with a radioactive waste disposal facility can impose surcharges on other states using the facility. 42 U.S.C. § 2021e(d)(2)(A). Twenty-five percent (25%) of these monies would be placed in an interest-bearing escrow account to be refunded to states meeting certain "mileposts" in developing their own facilities. Any remaining funds would be returned to the states imposing the surcharge. There is also no provision for the payment of interest on this escrow.

Perhaps the closest modern analog to the wrongful seizure cases, discussed *supra*, can be found in the Justice Assets Forfeiture Fund. Under 28 U.S.C. § 524(c), a special fund was established in the United States Treasury into which the Attorney General would deposit the proceeds of seized property. Significantly, there is no duty to invest the fund as it can be "kept on deposit *or* invested." 28 U.S.C. § 524(c)(5) (emphasis added). The fund can be used to pay valid liens and mortgages against property forfeited "subject to the discretion of the Attorney General to determine . . . the amount of payment." 28 U.S.C. § 524(c)(1)(C). The statute is silent on the recovery of interest on liens on property

wrongfully seized. Importantly, disputes on the recovery of post-seizure mortgage interest due innocent lienholders on seized property have already surfaced with the lower courts reaching inconsistent results. *Compare United States v. All That Tract & Parcel of Land*, 602 F. Supp. 307 (N.D. Ga. 1985) (holding that innocent lienholders on seized property entitled to interest accruing after date of seizure) *with United States v. One Piece of Real Estate*, 571 F. Supp. 723 (W.D. Tex. 1983) (holding that innocent lienholders on seized property *not* entitled to post-seizure interest).

Finally, the federal courts themselves have become temporary holders of large escrow amounts. Under 28 U.S.C. §§ 2041, 2042, the federal courts administer escrow monies which, since 1983, are placed in interest-bearing accounts. *See* Fed. R. Civ. P. 67. Claims on funds held by federal courts have also raised the issue of the application of the doctrine of sovereign immunity. *See, e.g., Bank of Hawaii v. Benchwick*, 249 F. Supp. 74, 78 (D. Hawaii 1966) (claim by bank to cash deposited as bail with court not barred by doctrine of sovereign immunity "for the United States has not proprietary rights in cash deposited as security for bail").

Given the existence of these escrow statutes, claims for interest on these funds, nominally against the sovereign, can be expected to raise the defense of the doctrine of sovereign immunity. For this reason as well, the Court should grant review of the decision below.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition for Writ of Certiorari, the petition should be granted.

Respectfully submitted,

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Date: April 8, 1987

APPENDIX

APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 6-35

CONSUMERS POWER COMPANY,
Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Defendants-Appellants.

[Filed May 30, 1986]

Before: GRANT, PECK, and MAXWELL, Judges.

ORDER

This appeal involves the August 14, 1985 final order of the United States District Court for the Eastern District of Michigan which directed defendants-appellants, the United States Department of Energy [hereinafter referred to as DOE], to place in escrow benefits owed to plaintiff-appellee, Consumers Power Company [hereinafter referred to as Consumers], pursuant to DOE's entitlements program, 10 C.F.R. # 211.67, and to add to this amount interest from and including September 8, 1982, the date of the original disposition of the merits of this case, until the date the escrow was established. We stayed the appeal pending the district court's decision on DOE's request to amend the judgment with re-

spect to the grant of postjudgment interest. The district court denied DOE's request on January 31, 1986, and simultaneously ordered further briefing on whether prejudgment interest ought to be added to Consumers' entitlements payment. The parties have agreed to be bound on the prejudgment interest issue by a final decision in *VGS Corporation d/b/a Southland Oil Company v. Department of Energy*, No. 5-119 (Temp. Emer. Ct. App.) which is scheduled for oral argument on June 4, 1986. DOE has deposited the disputed amount of prejudgment interest into escrow pending the resolution of this issue.

This matter now comes before this Court on DOE's Motion for Further Stay of Proceedings and Consumers' opposition to DOE's motion. Because the issue of prejudgment interest will likely be appealed, because that issue and the issue of postjudgment interest raise similar considerations, and because the issue of prejudgment interest will be resolved in a very short time, it is

ORDERED that DOE's motion to stay proceedings is granted. The parties should advise this Court by June 30, 1986, and each three-month period thereafter, as to the status of the prejudgment interest question in the district court.

Entered: 28 May 1986

/s/ Robert A. Grant
ROBERT A. GRANT
Senior District Judge